

# **Length of Time from Nomination to Confirmation for U.S. Circuit and District Court Nominees: Overview and Policy Options to Shorten the Process**

November 20, 2013

**Congressional Research Service**

<https://crsreports.congress.gov>

R43316

## Summary

The process by which lower federal court judges are nominated by the President and considered by the Senate is of continuing interest to Congress. Recent Senate debate over judicial nominations has frequently concerned whether a particular President's judicial nominees, relative to the nominees of other recent Presidents, waited longer for their nominations to be considered by the Senate. This report addresses this issue by (1) providing a statistical analysis of the time from nomination to confirmation for U.S. circuit and district court nominees from Presidents Reagan to Obama; (2) identifying possible consequences of a protracted confirmation process for circuit and district court nominees; and (3) identifying policy options the Senate might consider to shorten the length of time from nomination to confirmation for lower federal court nominees.

In general, the mean (average) and median number of days from nomination to confirmation increased during each presidency since President Reagan. For circuit court nominees confirmed during a President's time in office (whether one or two terms), the average number of days elapsed from nomination to confirmation ranged from 68.7 days during the Reagan presidency to 350.6 days during George W. Bush's presidency. The median number of days from nomination to confirmation for circuit court nominees confirmed ranged from 45 days (Reagan) to 229 days (Obama).

For district court nominees, the average time between nomination and confirmation ranged from 67.9 days (Reagan) to 220.8 days (Obama). For district court nominees, the median time elapsed ranged from a low of 41 days (Reagan) to 215 days (Obama).

There are several potential consequences of a protracted confirmation process for lower federal court nominees. These include (1) consistently high vacancy rates for circuit and district court judgeships as well as a greater number of such vacancies considered "judicial emergencies" by the Judicial Conference of the United States; (2) detrimental effects on the management of the federal courts, including judicial caseloads; (3) greater difficulty in finding highly qualified individuals who are willing to be nominated to the federal bench; (4) the politicization of the confirmation process in a manner that might leave the public with the impression that the ideological or partisan predisposition of the nominee is the primary consideration in determining how the nominee will approach his or her work on the bench.

Three policy options discussed in the report include the following:

- Utilizing time frames for various stages of the confirmation process for U.S. circuit and district court nominees, including the length of time from nomination to committee hearing as well as the length of time from committee report to final Senate action.
- Expediting the confirmation process for judicial nominations using "fast-track" procedures. Such procedures might include classifying some judicial nominations as "privileged nominations" as is currently done to expedite Senate consideration of nominations to some positions in the executive branch.
- Treating district court nominations differently than circuit court nominations by changing certain features of the confirmation process for district court nominations. Such changes might result in shortening the time from nomination to confirmation for district court nominees.

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## Introduction

In recent years a subject of continuing interest to Senators has been the length of time taken for lower federal court nominations to receive Senate confirmation.<sup>1</sup> Senate debate often has concerned whether a President's judicial nominees, relative to the nominees of other recent Presidents, encountered more difficulty or had to wait longer before receiving consideration by the Senate Judiciary Committee or up-or-down floor votes on confirmation.<sup>2</sup> Of related concern to the Senate have been recent increases in the number and percentage of vacant judgeships in the federal judiciary and the effect of delays in the processing of judicial nominations on filling such vacancies.<sup>3</sup>

This report seeks to inform the current debate in three ways: first, by providing an overview of the time taken by the Senate during recent presidencies to confirm U.S. circuit and district court nominees; second, by identifying potential consequences of a protracted confirmation process for such nominees; and third, by identifying policy options the Senate might consider to shorten the length of time from nomination to confirmation for U.S. circuit and district court nominees. It is comprised of four sections:

- A first section provides background information related to U.S. circuit and district courts, the two types of lower federal courts to which a President frequently makes nominations.
- A second section provides the average and median lengths of time from nomination to confirmation for circuit and district court nominees of the five most recent Presidents (i.e., Presidents Reagan to Obama).<sup>4</sup> The average and median waiting times from nomination to confirmation, the section concludes, generally increased from one presidency to the next for both circuit and district court nominees.<sup>5</sup> This section also discusses the adoption of a new standing order in the 113<sup>th</sup> Congress that might serve to facilitate negotiations arranging for

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<sup>1</sup> Specifically, nominations to the U.S. courts of appeals and U.S. district courts. As discussed in the text, U.S. district courts are the federal trial courts of general jurisdiction while the U.S. circuit courts of appeals take appeals from U.S. district courts and are also empowered to review the decisions of many administrative agencies.

<sup>2</sup> During the 112<sup>th</sup> Congress, for example, Senator Patrick J. Leahy of Vermont criticized the wait time for President Obama's judicial nominees as generally being much too long. In July 2012, Senator Leahy stated that the treatment of President Obama's nominees had "amounted to months of unnecessary delays" and that the Senate minority had engaged in "across-the-board stalling of judicial nominees," which he said had "led to the backlog in confirmations" and "months of delays" for certain nominees. Sen. Patrick J. Leahy, "Executive Session," Remarks in the Senate, *Congressional Record*, daily edition, July 10, 2012, p. S.4801. Senator Chuck Grassley has disputed the argument that President Obama's nominees have been treated differently by the Senate, stating "[b]y any objective measure, this President has been treated fairly and consistent with past Senate practice." Sen. Chuck Grassley, "Executive Session," Remarks in the Senate, *Congressional Record*, daily edition, July 10, 2012, p.S4803.

<sup>3</sup> See CRS Report R41942, *Vacancies on Article III District and Circuit Courts, 1977-2011: Data, Causes, and Implications*, by Denis Steven Rutkus.

<sup>4</sup> The "average" or "mean" is the arithmetic mean (both terms are used interchangeably throughout this report), while the "median" indicates the middle value for a particular set of numbers. In this case, the middle value for the number of days from nomination to confirmation for all circuit or district court nominees whose nominations were approved by the Senate during a President's tenure in office.

<sup>5</sup> A prior analysis by CRS has shown that the increase in average and median waiting times from nomination to confirmation for U.S. circuit and district court nominees includes the waiting times for nominees who are considered uncontroversial and receive bipartisan support among Senators. See CRS Report R42732, *Length of Time from Nomination to Confirmation for "Uncontroversial" U.S. Circuit and District Court Nominees: Detailed Analysis*, by Barry J. McMillion.

floor consideration of district court nominees (and, thus, might also shorten the length of time district court nominees wait to have their nominations considered by the full Senate).

- A third section identifies possible consequences of the relatively longer periods of time lower federal court nominees have waited, once nominated, to be confirmed by the Senate.
- A fourth section identifies and analyzes three policy options the Senate might consider in order to shorten the time from nomination to confirmation for at least some circuit and district court nominees.

This report does not take the position that all judicial nominations should be processed relatively quickly by the Senate. There might be instances in which heightened scrutiny of U.S. circuit and district court nominees by the Senate is warranted, leading to relatively long waiting times from nomination to confirmation for these nominees.<sup>6</sup> Additionally, given that there are no minimal qualifications or term limits for Article III judges, some Senators might argue that the emphasis of the confirmation process should be to avoid “rubber stamping” judicial nominations submitted by the President,<sup>7</sup> even if, presumably, such deliberate processing by the Senate leads to longer wait times for nominees to be confirmed.

## Article III Lower Courts

Article III, Section I of the Constitution provides, in part, that the “judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” It further provides that Justices on the Supreme Court and judges on lower courts established by Congress under Article III have what effectively has come to mean life tenure, holding office “during good Behaviour.”<sup>8</sup> Along with the Supreme Court, some other courts that constitute Article III courts in the federal system are the U.S. courts of appeals, the U.S. district courts, and the U.S. Court of International Trade.

As mentioned above, this report concerns nominations to the U.S. circuit courts of appeals and the U.S. district courts (including the territorial district courts). Outside the report’s scope are

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<sup>6</sup> One Senator has described the judicial confirmation process as “badly broken” and argued that delays in the confirmation process should be the exception rather than the rule, stating that “some delay in the Senate’s judicial confirmation may be necessary from time to time. If, for whatever reason, a majority of Senators needs more time to determine whether a particular nominee deserves confirmation, a short delay may be appropriate.” Senator John Cornyn, “Our Broken Judicial Confirmation Process and the Need for Filibuster Reform,” *Harvard Journal of Law & Public Policy*, vol. 27 (2003-04), pp. 183, 187.

<sup>7</sup> Senator Chuck Grassley has argued, for example, that “the Senate must not place quantity confirmed over quality confirmed. These lifetime appointments are too important to the Federal judiciary and the American people to simply rubber stamp them.” Sen. Chuck Grassley, “Executive Session,” Remarks in the Senate, *Congressional Record*, daily edition, October 13, 2011, p. S.6487. Similarly, Senator Jeff Sessions has stated that the Senate “need[s] to take time to look at nominees and ask the tough questions. We are not a rubberstamp.” Sen. Jeff Sessions, “Executive Session,” Remarks in the Senate, *Congressional Record*, daily edition, November 9, 2009, p. S11275. And, finally, as one scholar has stated “[i]t is neither surprising nor wrong that conflict over decisions to appoint particular individuals has emerged. Life tenure is a rare event in any democracy, and those selected and confirmed to serve must, therefore, be individuals in whom confidence is shared.” Judith Resnik, “Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure,” *Cardozo Law Review*, vol. 26 (2004-05), p. 631 (hereinafter Resnik, “Judicial Selection and Democratic Theory”).

<sup>8</sup> Pursuant to this constitutional language, Article III judges may hold office for as long as they live or until they voluntarily leave office. A President has no power to remove them from office. Article III judges, however, may be removed by Congress through the process of impeachment by the House and conviction by the Senate.

nominations to the U.S. Supreme Court and the occasional nominations that Presidents make to the nine-member U.S. Court of International Trade.

## **U.S. Courts of Appeals**

The U.S. courts of appeals take appeals from federal district court decisions and also review the decisions of many administrative agencies. Cases presented to the courts of appeals are generally considered by judges sitting in three-member panels. Courts within the courts of appeals system are often called “circuit courts” (e.g., the First Circuit Court of Appeals is also referred to simply as the “First Circuit”), because the nation is divided into 12 geographic circuits, each with a U.S. court of appeals. One additional nationwide circuit, the Federal Circuit, hears certain specialized legal claims. Altogether, 179 appellate court judgeships for these 13 courts of appeals are currently authorized by law. The First Circuit (comprising Maine, Massachusetts, New Hampshire, Rhode Island, and Puerto Rico) has the fewest number of authorized appellate court judgeships, 6, while the Ninth Circuit (comprising Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) has the most, 29.

In this report, nominations to U.S. courts of appeals judgeships are frequently referred to as “circuit court nominations.”

## **U.S. District Courts**

U.S. district courts are the federal trial courts of general jurisdiction. There are 91 Article III district courts: 89 in the 50 states, plus one in the District of Columbia and one more in Puerto Rico. Each state has at least one U.S. district court, while some states (specifically California, New York, and Texas) have as many as four. Altogether, 673 Article III U.S. district court judgeships are currently authorized by law. Congress has authorized between 1 and 28 judgeships for each district court. The Eastern District of Oklahoma has 1 judgeship (the smallest number among Article III district courts), while the Southern District of New York and the Central District of California each have 28 judgeships (the most among Article III district courts).

Additionally, there are three U.S. territorial courts established by Congress pursuant to its authority to govern the territories under Article IV of the Constitution. Judicial appointees to these courts serve 10-year terms, with one judgeship each in Guam and the Northern Mariana Islands, and two in the U.S. Virgin Islands.<sup>9</sup>

In sum, references throughout this report to U.S. district court judgeships include a total of 677 judgeships (673 Article III judgeships, of which 10 are temporary, and 4 territorial judgeships).

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<sup>9</sup> While American Samoa is an overseas territory of the United States, it does not have a federal district court and has not been incorporated into a federal judicial district. The High Court of American Samoa is the court of general jurisdiction for the territory. The High Court has limited jurisdiction to hear cases under particular federal statutes. See Michael W. Weaver, “The Territory Federal Jurisdiction Forgot: The Question Of Greater Federal Jurisdiction In American Samoa,” *Pacific Rim Law & Policy Journal Association*, vol. 17 (March 2008), p. 325.

## Length of Time from Nomination to Confirmation for Judicial Nominees Across Recent Presidencies

This section provides statistics related to the length of time it has taken for circuit and district court nominees, once nominated by the President, to be confirmed by the Senate.<sup>10</sup> **Figure 1** tracks by President, from Reagan to Obama, the mean (average) and median number of days from nomination to confirmation for all circuit and district court nominees confirmed during a President's tenure in office (whether one or two terms).<sup>11</sup> In general, the average and median time from nomination to confirmation has increased during each presidency since President Reagan.

If a nominee was nominated more than once by a President, prior to the nominee's eventual confirmation by the Senate, the first date on which he or she was nominated was used to calculate the days elapsed from nomination to confirmation. Note that the average and median number of days from nomination to confirmation can reflect various factors, including opposition by the minority party in the Senate,<sup>12</sup> committee and floor scheduling decisions unrelated to partisan opposition to the nomination, and delays in receiving requested background information from nominees.<sup>13</sup>

### U.S. Circuit Court Nominees

As shown in **Figure 1**, President George W. Bush's circuit court nominees who were confirmed during his two terms waited, on average, the longest period of time from first nomination to confirmation (350.6 days). As of November 1, 2013, President Obama's nominees waited, on average, the second-longest period of time (257 days) followed by the circuit court nominees of Presidents Clinton (238.2 days), George H.W. Bush (103.7 days), and Reagan (68.7 days).<sup>14</sup>

President G.W. Bush's circuit nominees waited, *on average*, the longest period of time from nomination to confirmation while President Obama's circuit court nominees have, thus far, had

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<sup>10</sup> The length of time it takes a judicial nominee, once nominated, to be confirmed by the Senate depends (in part) on the length of time the nominee waits for a committee hearing, the length of time until his or her nomination is reported, and the length of time it remains on the *Executive Calendar* prior to being considered by the full Senate. These stages of the confirmation process are more fully discussed in CRS Report R43058, *President Obama's First-Term U.S. Circuit and District Court Nominations: An Analysis and Comparison with Presidents Since Reagan*, by Barry J. McMillion.

<sup>11</sup> As stated previously, the "average" or "mean" is the arithmetic mean (both terms are used interchangeably throughout this report), while the "median" indicates the middle value for a particular set of numbers. In this case, the middle value for the number of days from nomination to confirmation for all circuit or district court nominees whose nominations were approved by the Senate during a President's tenure in office.

<sup>12</sup> For a discussion on the background and types of holds, see CRS Report 98-712, "*Holds in the Senate*," by Walter J. Oleszek. The use of anonymous holds, especially by Senators belonging to the minority party, has received particular attention in recent years. Norman Ornstein has argued that "the use of holds to block multiple nominations for not weeks or months but years or until death, were not typical [in the past]; now they are the standard. Democrats were mischief-makers in the George W. Bush years; Republicans in the Barack Obama years have become recidivist hard-core offenders." "Shame on the Senate for Confirmation Games," *Roll Call*, Dec. 14, 2011, p. 22.

<sup>13</sup> For further discussion of factors that influence the confirmation process generally, see CRS Report R43058, *President Obama's First-Term U.S. Circuit and District Court Nominations: An Analysis and Comparison with Presidents Since Reagan*, by Barry J. McMillion. See also Logan Dancey, Kjersten R. Nelson, and Eve M. Ringsmuth, "'Strict Scrutiny?' The Content of Senate Judicial Confirmation Hearings during the George W. Bush Administration," *Judicature*, vol. 95 (Nov./Dec. 2011), p. 128.

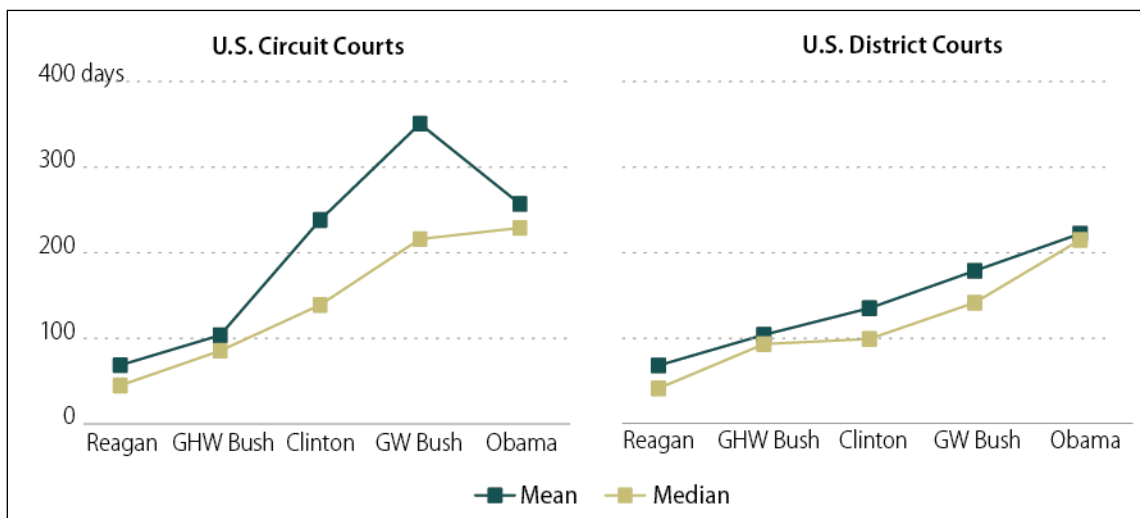
<sup>14</sup> The number of circuit court nominees whose nominations were confirmed by the Senate ranged from a high of 83 during the Reagan presidency to a low of 39, thus far, during the Obama presidency.



the longest *median* wait time from first nomination to confirmation (229 days).<sup>15</sup> This statistic is interpreted to mean that half of the circuit court nominees who have been confirmed during President Obama's time in office (as of November 1, 2013) waited more than 229 days from nomination to confirmation, while the other half waited less than 229 days.

The circuit court nominees who were confirmed during President G.W. Bush's tenure had the second longest median wait time (216 days)<sup>16</sup> followed, in decreasing order, by the circuit court nominees of President Clinton (139 days), G.H.W. Bush (85.5 days), and Reagan (45 days).

**Figure 1. U.S. Circuit and District Court Nominees of Five Most Recent Presidents: Mean and Median Number of Days from Nomination to Confirmation**



**Source:** Internal CRS judicial nominations database.

**Note:** This figure shows, for each of the past five Presidents, the mean and median number of days from first nomination to confirmation for all U.S. circuit and district court nominees who were confirmed during a President's tenure (whether one or two terms). The statistics for nominees during the Obama presidency are current through November 1, 2013.

## U.S. District Court Nominees

Turning again to **Figure 1**, President Obama's confirmed nominees for district courts waited, on average, 220.8 days from nomination to confirmation. President G.W. Bush's district nominees waited, on average, 178.8 days. The district court nominees confirmed during President Clinton's two terms waited an average of 135 days while the nominees of Presidents G.H.W. Bush and Reagan waited on average 103.8 and 67.9 days, respectively.<sup>17</sup>

<sup>15</sup> Note that the median, or middle value for the nominees, is less affected by outliers or extreme cases, i.e., nominees whose elapsed time from first nomination to confirmation was unusually long or short.

<sup>16</sup> The fact that the mean number of days for President G.W. Bush's circuit court nominees is approximately 135 days longer than the median number of days for the same group of nominees suggests that there was a group of nominees whose nominations were approved by the Senate after relatively lengthy periods of time after first being nominated as compared with the nominations of President G.W. Bush's other circuit court nominees. For example, approximately 23% of President G.W. Bush's circuit court nominees waited more than 500 days from first nomination to confirmation while nearly half (48%) waited less than 200 days from first nomination to confirmation.

<sup>17</sup> The number of district court nominees whose nominations were confirmed by the Senate ranged from a high of 307 during the Clinton presidency to a low of 150 during the G.H.W. Bush presidency.



The median waiting times from nomination to confirmation for district court nominees ranged from a high of 215 days, thus far, during President Obama's time in office to a low of 41 days during President Reagan's two terms. The median waiting times from nomination to confirmation for district court nominees of the remaining three Presidents were 141.5 days (G.W. Bush), 99 days (Clinton), and 93 days (G.H.W. Bush).<sup>18</sup>

Perhaps in response to the relatively longer waiting times experienced by President Obama's district court nominees, the Senate adopted a new standing order in the 113<sup>th</sup> Congress that might serve to facilitate negotiations arranging for floor consideration of district court nominations (and, thus, might serve to shorten the length of time district court nominees wait to have their nominations considered by the full Senate once their nominations are reported by the Judiciary Committee).<sup>19</sup>

The standing order provides for a new procedure in effect for just the 113<sup>th</sup> Congress by which the Senate could move more quickly to final action on district court nominations supported by at least three-fifths of the Senate. Specifically, if cloture is invoked on a district court nomination in accordance with Rule XXII of the Senate, post-cloture consideration is reduced from a maximum of 30 hours to 2 hours.<sup>20</sup> Generally, district court nominations are considered pursuant to unanimous consent agreements. The majority leader, when the new standing order was approved, indicated that the intent is to continue to negotiate unanimous consent agreements for the consideration of such nominations<sup>21</sup>—which might be facilitated by the alternative provided by the standing order.<sup>22</sup>

As of November 2013, an insufficient number of district court nominations have been considered since the beginning of the 113<sup>th</sup> Congress to measure whether the standing order has been effective in shortening the length of time to confirm such nominations. If it is determined in the future that the standing order is useful in shortening the time from nomination to confirmation for district court nominees, the Senate might consider renewing it on a temporary basis for future congresses (or making it permanent).

## **Possible Consequences of Longer Waiting Times from Nomination to Confirmation**

In recent years, scholars and others concerned with the judicial appointment process have identified possible consequences of relatively long waiting times from nomination to

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<sup>18</sup> President Obama is the only President of these five for whom, during his time in office, U.S. circuit and district court nominees waited, both in terms of average and median number of days, more than half of a calendar year (i.e., more than 182 days) to be confirmed after being nominated.

<sup>19</sup> Note that circuit court nominations are not affected by the new standing order.

<sup>20</sup> As one observer noted, prior to the new standing order, "even where the sixty votes required by Rule XXII can be mustered, a successful cloture vote comes with its own cost in the form of thirty hours of debate time that the minority can force even after cloture has been invoked. Just a few dozen nominees would mean hundreds of hours of post-cloture floor time. In a busy Congress ... the Majority Leader does not have that much time available to spend." Michael L. Shenkman, "Decoupling District from Circuit Judge Nominations: A Proposal to Put Trial Bench Confirmations on Track," *Arkansas Law Review*, vol. 65 (2012), pp. 295 (hereinafter Shenkman, "Decoupling District from Circuit Judge Nominations").

<sup>21</sup> Sen. Harry Reid, Remarks in the Senate, *Congressional Record*, daily edition, January 24, 2013, p.S272.

<sup>22</sup> For further discussion of the standing order in effect for the 113<sup>th</sup> Congress, see CRS Report R42996, *Changes to Senate Procedures in the 113<sup>th</sup> Congress Affecting the Operation of Cloture (S.Res. 15 and S.Res. 16)*, by Elizabeth Rybicki.

confirmation experienced by judicial nominees.<sup>23</sup> Five of the more notable possible consequences are discussed below.

## Increase in Vacancy Rates of Circuit and District Court Judgeships

A protracted confirmation process might contribute to an increase in vacancy rates for U.S. circuit and district court judgeships as well as an increase in the number of vacancies considered “judicial emergencies” by the Judicial Conference of the United States.<sup>24</sup> In recent years there have been several episodes of “historically high” vacancy rates for U.S. circuit and district court judgeships.<sup>25</sup> Such periods in which vacancy rates have increased to historically high levels have occurred during presidencies in which, as shown in **Figure 1**, the length of time it takes to confirm circuit and district court nominees has similarly increased.

Additionally, as reported previously by CRS, President Obama is the only White House occupant since at least President Reagan for whom the district court vacancy rate increased during a presidential first term unaccompanied by the creation of new district court judgeships.<sup>26</sup> Such an increase in the vacancy rate coincided, during President Obama’s first term, with historically high average and median waiting times from nomination to confirmation for U.S. district court nominees.<sup>27</sup>

## Detrimental Effects on Judicial Administration

If longer waiting times from nomination to confirmation are associated with higher vacancy rates, then longer waiting times might also have a detrimental effect on the management of the federal

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<sup>23</sup> See, for example, Shenkman, “Decoupling District from Circuit Judge Nominations,” pp. 229-31; Vicki C. Jackson, “Packages of Judicial Independence: The Selection and Tenure of Article III Judges,” *Georgetown Law Journal*, vol. 95 (2006-07), p. 979 (hereinafter Jackson, “Packages of Judicial Independence”); Michael Teter, “Rethinking Consent: Proposals for Reforming the Judicial Confirmation Process,” *Ohio State Law Journal*, vol. 73 (2012), pp. 297-99; Karl A. Schweitzer, “Litigating the Appointments Clause: The Most Effective Solution for Senate Obstruction of the Judicial Confirmation Process,” *University of Pennsylvania Journal of Constitutional Law*, vol. 12 (Mar. 2010), p. 915; Sarah A. Binder and Forrest Maltzman, *Advice and Dissent: The Struggle to Shape the Federal Bench and Why it Matters* (Washington, DC: Brookings Institution Press, 2009), pp. 127-42 (hereinafter “Advice & Dissent”).

<sup>24</sup> The Judicial Conference of the United States is the principal policymaking body concerned with the administration of the U.S. Courts. The Conference defines a “judicial emergency” for a circuit court vacancy as any vacancy in a court of appeals where adjusted case filings per appellate panel are in excess of 700 or any vacancy that is in existence more than 18 months where adjusted filings are between 500 to 700 per panel. For district court vacancies, a judicial emergency exists when a district court has weighted filings in excess of 600 per judgeship; or a vacancy is in existence more than 18 months where weighted filings are between 430 to 600 per judgeship; or any district court with more than one authorized judgeship and only one active judge. A list of vacancies considered “judicial emergencies” by the Judicial Conference is available on the U.S. Courts website at <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx>. The president of the American Bar Association has suggested that judicial emergencies are now more prevalent because of the length of time it takes for the Senate to confirm judicial nominees. See Laurel Bellows, “Judicial emergencies worsen as partisanship stalls nominations in the Senate,” *President’s Message* (July 1, 2013), online at [http://www.abajournal.com/magazine/article/judicial\\_emergencies\\_worsen\\_as\\_partisanship\\_stalls\\_nominations\\_in\\_the\\_senat](http://www.abajournal.com/magazine/article/judicial_emergencies_worsen_as_partisanship_stalls_nominations_in_the_senat).

<sup>25</sup> CRS Report R41942, *Vacancies on Article III District and Circuit Courts, 1977-2011: Data, Causes, and Implications*, by Denis Steven Rutkus. The report notes, for example, that “throughout most of the 111<sup>th</sup> Congress, the effective vacancy rate in the district courts was well above the historically high benchmark of 10.6%, reaching as high as 13.6% near the end of the Congress.”

<sup>26</sup> See CRS Report R43058, *President Obama’s First-Term U.S. Circuit and District Court Nominations: An Analysis and Comparison with Presidents Since Reagan*, by Barry J. McMillion.

<sup>27</sup> As displayed in **Figure 1**, President Obama’s district court nominees have waited, both in terms of the average and median number of days, more than 200 days from nomination to confirmation.

courts, and on caseload management in particular. Such an effect might disproportionately impact those courts with relatively heavier caseloads.<sup>28</sup>

Such a relationship between longer waiting times and a decline in the quality or efficiency of judicial administration has been suggested by Chief Justice John G. Roberts, Jr., as well as by his predecessor, Chief Justice William Rehnquist. Chief Justice Roberts, noting that vacancies are not evenly distributed across judicial districts, has stated that “a persistent problem has developed in the process of filling judicial vacancies.... This has created acute difficulties for some judicial districts. Sitting judges in those districts have been burdened with extraordinary caseloads.”<sup>29</sup> Consequently, he has argued that there is “an urgent need for the political branches to find a long-term solution to this recurring problem.”<sup>30</sup>

Similarly, former Chief Justice Rehnquist argued that “[j]udicial vacancies can contribute to a backlog of cases, undue delays in civil cases, and stopgap measures to shift judicial personnel where they are most needed. Vacancies cannot remain at such high levels indefinitely without eroding the quality of justice that traditionally has been associated with the federal judiciary.”<sup>31</sup> He emphasized the need to more quickly fill judicial vacancies, arguing “[T]o continue functioning effectively and efficiently, our federal courts must be appropriately staffed. This means that judicial vacancies must be filled in a timely manner with well-qualified candidates.... We [the judiciary] simply ask that the President nominate qualified candidates with reasonable promptness and that the Senate act within a reasonable time to confirm or reject them.”<sup>32</sup>

## Fewer Highly Qualified Nominees

Fewer qualified individuals might be willing to be nominated because of the protracted length of time it takes to be confirmed. A relatively lengthy time from nomination to confirmation might interfere with professional and personal obligations of potential nominees. Such interference might cause some qualified individuals to forgo the opportunity to serve on the federal bench.

Such interference might be particularly problematic for nominees working in private practice. As Justice Rehnquist noted, “[A] drawn-out and uncertain confirmation process is a handicap to judicial recruitment across the board, but it most significantly restricts the universe of lawyers in private practice who are willing to be nominated for a federal judgeship.... for lawyers coming directly from private practice, there is both a strong financial disincentive and the possibility of losing clients in the course of the wait for a confirmation vote.”<sup>33</sup>

Another observer argues that, in terms of the protracted periods of time that some recent nominees have waited for a Senate vote after being reported by the Judiciary Committee, “[T]he cost to nominees is real. They and their families find it stressful. For nominees in private practice, the delay is expensive as their work dries up. For nominees who are serving as state or magistrate

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<sup>28</sup> Caseload statistics for U.S. circuit and district court can be accessed at <http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx>.

<sup>29</sup> Chief Justice John G. Roberts, Jr., “2010 Year-End Report on the Federal Judiciary,” Jan. 2011, <http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf>.

<sup>30</sup> Ibid.

<sup>31</sup> Chief Justice William Rehnquist, “1997 Year-End Report on the Federal Judiciary,” *Third Branch*, Jan. 1998.

<sup>32</sup> Chief Justice William H. Rehnquist: In His Own Words, *Third Branch*, Sept. 2005, [http://www.uscourts.gov/news/TheThirdBranch/05-09-01/Chief\\_Justice\\_William\\_H\\_Rehnquist\\_In\\_His\\_Own\\_Words.aspx](http://www.uscourts.gov/news/TheThirdBranch/05-09-01/Chief_Justice_William_H_Rehnquist_In_His_Own_Words.aspx).

<sup>33</sup> Chief Justice William Rehnquist, “2001 Year-End Report on the Federal Judiciary,” Jan. 2002, <http://www.supremecourt.gov/publicinfo/year-end/2001year-endreport.aspx>.

judges, there is also a cost to the efficiency of the courts on which the nominees are sitting at the time of nomination, as the delay creates uncertainty and difficulty for their litigants.”<sup>34</sup> Such difficulties might lead some individuals, who would otherwise be highly qualified nominees for the federal bench, to pass on the opportunity to be nominated.<sup>35</sup>

## Excessive Emphasis on the Ideological or Partisan Predisposition of Nominees

Longer waiting times from nomination to confirmation might politicize the confirmation process in a way that leaves the public with the impression that the ideological or partisan predisposition of the nominee is the primary consideration in determining how the nominee will approach his or her work on the bench. A former chief judge of the Fifth Circuit Court of Appeals, for example, has argued as much, stating that “a highly partisan or ideological judicial selection process conveys the notion to the electorate that judges are simply another breed of political agents, that judicial decisions should be in accord with political ideology, all of which tends to undermine public confidence in the legitimacy of the courts.”<sup>36</sup>

For district court nominees in particular, the impression by the public that trial judges routinely act based on their partisan or ideological predisposition might be at odds with the reality of the type of work they typically do while on the bench. For example, former Attorney General Nicholas Katzenbach has argued that “[m]ost trial lawyers will say that the political or ideological views of a trial judge are not very important. What is important is his experience with litigation, his demeanor on the bench, and the fairness of his rulings on evidence.”<sup>37</sup>

## Other Potential Consequences

Finally, a confirmation process characterized by longer waiting times might adversely affect the Senate in ways not directly related to the confirmation process itself. For example, a protracted confirmation process characterized by partisan or ideological rancor might have a “spill-over” effect of politicizing issues related to the judiciary that might otherwise enjoy bipartisan support, such as “legislation that could affect the independent operation of the federal courts (court funding, judicial salaries, jurisdiction),”<sup>38</sup> as well as leading to “substantive [congressional] intrusions on adjudicatory functions ...”<sup>39</sup>

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<sup>34</sup> Shenkman, “Decoupling District from Circuit Court Nominations,” p. 297.

<sup>35</sup> This might be particularly true given other trends related to the federal judiciary, such as stagnant judicial salaries and an increase in caseloads. As Russell Wheeler has noted, “the changes that make the job less attractive than it was several years ago elevate the importance of a selection process that is not itself an impediment that discourages good people from considering federal judicial service.” “Is Our Dysfunctional Process for Filling Judicial Vacancies an Insoluble Problem?”, Jan. 2013, p. 8, [http://www.acslaw.org/sites/default/files/Wheeler\\_-\\_Filling\\_Judicial\\_Vacancies.pdf](http://www.acslaw.org/sites/default/files/Wheeler_-_Filling_Judicial_Vacancies.pdf) (hereinafter Wheeler, “Dysfunctional Process”).

<sup>36</sup> Judge Carolyn D. King, “Hallows Lecture: Challenges to Judicial Independence and the Rule of Law: A Perspective from the Circuit Courts,” *Marquette Law Review*, vol. 90 (2007), p. 782.

<sup>37</sup> Nicholas Katzenbach, *Some Of It Was Fun: Working With RFK and LBJ*, (New York, NY: Norton, 2008), pp. 60-61, cited in Shenkman, “Decoupling District from Circuit Court Nominations,” p. 228. Shenkman himself states “[t]rial judges require judgment about the care and feeding of the cases on their docket—and of litigants and their lawyers. They must answer many legal questions without political roots,” p. 228.

<sup>38</sup> Jackson, “Packages of Judicial Independence,” p. 985.

<sup>39</sup> *Ibid.*

## Policy Options for Shortening the Time from Nomination to Confirmation

This section discusses three proposals to shorten the amount of time, generally, from nomination to confirmation for U.S. circuit and district court nominees.<sup>40</sup> These proposals are not mutually exclusive and any policy adopted by the Senate to shorten the length of time from nomination to confirmation for judicial nominees might incorporate elements of more than one of the proposals.

As the scope of this report includes only the time from nomination to confirmation, this section does not include proposals that have been offered to reform or change the pre-nomination stage of the judicial confirmation process.<sup>41</sup> This section, furthermore, does not provide an exhaustive list or description of potential policies that might be adopted by the Senate to shorten the time from nomination to confirmation for lower federal court nominees.<sup>42</sup>

### Imposition of Time Tables on the Confirmation Process

The Senate might consider adopting a time table for one or more stages of the nomination process. Such time tables would establish deadlines for Senate action on judicial nominations.

Both Presidents G.W. Bush and Obama, for example, have offered such proposals. Specifically, in 2002, President G.W. Bush proposed two deadlines: a nominee would (1) receive a hearing before the Senate Judiciary Committee within 90 days of being nominated, and (2) receive an up-or-down vote in the Senate within 180 days of being nominated.<sup>43</sup> President Bush, in proposing the deadlines, argued that a “strict deadline is the best way to ensure that judicial nominees are promptly and fairly considered. And 90 days is more than enough time for the committee to conduct necessary research before holding a hearing.” Additionally, he maintained that the 180

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<sup>40</sup> These proposals might also contribute to making the time from nomination to confirmation more uniform across different presidencies, irrespective of variations occurring in the partisan composition of the Senate. As one scholar has noted, however, the current confirmation “process may not be amenable to a ‘solution’ if that means a return to the days of prompt and virtually controversy-free confirmations,” and it might be the case that “confirmations measured in days after nominations, rather than months” are unlikely to return any time soon. Wheeler, “Dysfunctional Process,” p. 4. The difficulty, in part, in adopting any reforms intended to reduce the amount of time from nomination to confirmation is because “[w]ith the perceived stakes of judicial appointments high, the minority party is unlikely to agree to any procedural reform that diminishes its existing ability to influence the course of advice and consent.” Sarah Binder, “Advice and Consent for Judicial Nominations: Can the President and the Senate Do Better?”, March 2009, p. 28, <http://www.wilsoncenter.org/sites/default/files/Binder.pdf> (hereinafter Binder, “Advice and Consent”).

<sup>41</sup> One such proposal is the creation of a single-issue office within the White House concerned only with judicial nominations, similar to the Council on Environmental Quality or the Office of National Drug Policy. David Fontana, “Judging Obama’s Second Term,” *Huffington Post*, Nov. 14, 2012, [http://www.huffingtonpost.com/david-fontana/obama-judicial-appointments-2nd-term\\_b\\_2131912.html](http://www.huffingtonpost.com/david-fontana/obama-judicial-appointments-2nd-term_b_2131912.html). Presumably such an office might reduce the amount of time it takes a President to nominate individuals to vacant judgeships by making more efficient the selection and vetting of nominees. Additionally, the New York Times has editorialized that nominees should be recommended by Senators within 60 days of a vacancy and the White House and Justice Department should nominate candidates within 60 days of receiving such recommendations. “Judges Needed for Federal Courts,” *New York Times*, Dec. 12, 2012, <http://www.nytimes.com/2012/12/13/opinion/judges-needed-for-federal-courts.html>.

<sup>42</sup> For a comprehensive discussion of other reform proposals see Mitchel A. Sollenberger, *Judicial Appointments and Democratic Controls* (Durham, NC: Carolina Academic Press, 2011), pp. 157-186.

<sup>43</sup> President G.W. Bush also proposed that Presidents submit judicial nominations to the Senate within 180 days of receiving notice of a federal court vacancy or intended retirement. President George W. Bush, “Remarks by the President on Judicial Nominations,” October 30, 2002, <http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021030-6.html>.



days deadline for final Senate action “is a very generous period of time that will allow all the Senators to evaluate nominees and have their votes counted.”<sup>44</sup> For his part, President Obama has not offered a deadline for nominees to receive a hearing but instead called for a Senate rule that would require all judicial (and executive) nominees to receive an up-or-down vote by the full Senate within 90 days of being nominated.<sup>45</sup>

Such proposals have not come solely from Presidents.<sup>46</sup> In 2004, Senator Arlen Specter of Pennsylvania introduced a resolution providing for a series of time tables or deadlines for Senate action on judicial nominations.<sup>47</sup> The three deadlines proposed by Senate Specter required (1) the Judiciary Committee to hold a hearing on the nomination within 30 days after the nomination was submitted to the Senate; (2) the committee to act on the nomination within 30 days of the hearing; and (3) the full Senate act on the nomination within 30 days after the committee reported out the nomination. The proposal also authorized the committee chair and the Senate majority leader to extend the period for committee and full Senate action, respectively, by up to an additional 30 days for cause. Presumably, however, the maximum amount of time from nomination to final Senate action for most nominees would not exceed 90 days.<sup>48</sup>

One concern that the Senate might have in adopting time tables is the question of enforcement (i.e., how would the Senate ensure that such time tables are followed and would there be any consequences if deadlines are not met?) Second, the Senate might be concerned that, by committing itself to certain deadlines, it would give a President greater leverage or influence in the selection of judicial nominees. During the G.W. Bush presidency, for example, CRS noted that streamlining the confirmation process with various timelines “could tip the balance of power on the selection of [judicial] nominees toward the President.”<sup>49</sup> Another concern might be that

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<sup>44</sup> Ibid.

<sup>45</sup> President Barack Obama, “Remarks by the President in the State of the Union Address,” Jan. 24, 2012, <http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-President-state-union-address>.

<sup>46</sup> Another proposal by two law professors, Michael Gerhardt and Richard Painter, includes time tables for Senate action on nominations. The two propose (i) Senate hearings being scheduled within 90 days of when the President sends the nomination to the Senate; (ii) the end of using anonymous holds to delay committee or full Senate action on the nomination; instead, the Senate would accommodate brief delays of up to 30 days for a committee or floor vote if a Senator, with the support of one other Senator, states a good reason for the delay, and why his or her concerns could have not been addressed earlier; and (iii) once a judicial nominee is reported out of committee, the presumption in the Senate should be that a majority of “yes” votes are needed to confirm the nominee. In rare cases, Senators objecting to a vote would be permitted to introduce a resolution stating with specificity their objections to the nomination, and if the resolution received a specific number of affirmative votes in support of it (e.g., at least 45) from other Senators, it would delay a final up-or-down confirmation vote on the nomination for a specified period of time, perhaps until the next session of Congress after which there would be an up-or-down vote with no further delay. See Michael Gerhardt & Richard Painter, “‘Extraordinary Circumstances’: The Legacy of the Gang of 14 and a Proposal for Judicial Nominations Reform,” November 2011, pp. 6-7, [http://www.acslaw.org/sites/default/files/Gerhardt-Painter\\_-\\_Extraordinary\\_Circumstances.pdf](http://www.acslaw.org/sites/default/files/Gerhardt-Painter_-_Extraordinary_Circumstances.pdf).

<sup>47</sup> Senator Arlen Specter, S.Res. 327, “A resolution providing for a protocol for nonpartisan confirmation of judicial nominees,” introduced on April 1, 2004, <https://www.govtrack.us/congress/bills/108/sres327>.

<sup>48</sup> One bipartisan proposal, by a Miller Center Commission, called on the Senate to act even more quickly on judicial nominations. The Commission stated that the “Senate Judiciary Committee and the Senate should clear nominees for full Senate confirmation within two months [or approximately 60 days] of receiving the president’s nomination.” Miller Center Commission No. 7, “Report of the Commission on the Selection of Federal Judges,” 1996, p. 9, [http://web1.millercenter.org/commissions/comm\\_1996.pdf](http://web1.millercenter.org/commissions/comm_1996.pdf) (hereinafter “Miller Center Report”). The Commission included members such as former Attorney General Nicholas Katzenbach; former Senator (and Majority Leader) Howard H. Baker, Jr.; former Senator Birch Bayh, Jr.; former White House Counsel Lloyd N. Cutler; and former White House Counsel Fred F. Fielding.

<sup>49</sup> CRS Report RS21506, *Implications for the Senate of President Bush’s Proposal on Judicial Nominations*, by Betsy Palmer.

time tables would, instead, result in lengthening the time from nomination to confirmation for some nominations. For example, Jane Kelly, a recent nominee to the Eighth Circuit Court of Appeals, was confirmed by the Senate on April 24, 2013—83 days after being nominated by President Obama on January 31, 2013. The imposition of a rigid time table on nominations such as the Kelly nomination (which are uncontroversial) might have the unintended result of lengthening the amount of time from nomination to confirmation for such nominees.

## Fast-Track Certain Nominations

In addition to imposing deadlines on various stages of the confirmation process, the Senate might also consider mechanisms that would enable some judicial nominations to be more quickly acted upon by the full Senate (i.e., receive “fast-track” treatment after the nomination is submitted by the President). Such fast-track treatment might involve the Senate (by statute, standing order or rule) committing to process certain nominations within a certain amount of time after they are submitted by the President.

One proposal involves giving fast-track consideration to nominees recommended by bipartisan commissions in their home states.<sup>50</sup> If the President selects an individual from a list of candidates recommended by a bipartisan commission, then the nominee would be given fast-track “protection” during the confirmation process. If, however, the President selects someone not recommended by a bipartisan commission, the nomination would not be given fast-track consideration by the Senate. While such bipartisan commissions are currently used by some Senators,<sup>51</sup> the empirical evidence from President Obama’s first term does not suggest that nominees selected by commissions are confirmed more quickly than nominees from states without such commissions.<sup>52</sup>

Another option available to the Senate is to consider some judicial nominations as “privileged nominations” for the purpose of potentially shortening the time from nomination to confirmation. Such an approach was recently adopted by the Senate during the 112<sup>th</sup> Congress for nominations to 272 positions across various Cabinet agencies, oversight boards and advisory councils, and independent agencies. Specifically, S.Res. 116, approved by the Senate on June 29, 2011, provides for an alternative confirmation process of nominations to these particular positions. This new approach allows these nominations to bypass formal committee consideration unless a single Senator objects to using the expedited process. The positions included in the resolution tend not to be those associated with controversy and their nominations in the past typically have required little individual floor debate for confirmation.<sup>53</sup>

The specific provisions of S.Res. 116 provide that once the Senate receives a nomination to one of the specified 272 positions, it is placed on the Senate’s *Executive Calendar* as a “privileged nomination.” Although the nomination is not formally referred to committee, the committee is still responsible for gathering biographical and financial information used to evaluate the nominee. After the chair of the committee of jurisdiction notifies, in writing, the Senate’s executive clerk that all the information requested has been received, the nomination remains on

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<sup>50</sup> Sarah A. Binder and Forrest Maltzman, “Advice & Dissent,” pp. 147-48; Binder, “Advice and Consent,” p. 28.

<sup>51</sup> For further discussion, see CRS Report RL34405, *Role of Home State Senators in the Selection of Lower Federal Court Judges*, by Denis Steven Rutkus.

<sup>52</sup> Wheeler, “Dysfunctional Process,” p. 13.

<sup>53</sup> For further discussion, see CRS Report R41872, *Presidential Appointments, the Senate’s Confirmation Process, and Changes Made in the 112<sup>th</sup> Congress*, by Maeve P. Carey. Some of the information presented above in the section “Fast-track certain nominations” is taken from this report.



the list of “privileged nominations” for 10 session days before being moved to the list of “nominations” on the *Executive Calendar*.

At any time from when the Senate receives the nomination to when the nomination is placed on the list of “nominations” on the calendar (i.e., while the nomination is still pending on the “privileged nominations” list), any Senator can request that the nomination be referred to committee, and not be considered using the new process. The nomination then proceeds using the existing confirmation process, beginning with referral to committee. In this manner, S.Res. 116 utilizes the existing practices of the Senate’s unanimous consent process, where objection from even one Senator will prevent the new process from being used.

Adopting such a resolution for some judicial nominations might have the effect of shortening the time from nomination to confirmation. While the Senate Judiciary Committee would retain its information-gathering function (and Senators on the committee would be able to signal to other Senators their approval or disapproval of the nominations through informal discussions and floor speeches), removing the committee’s need to act on these nominations might expedite the process for nominations that are uncontroversial and would receive unanimous support by the full Senate.<sup>54</sup>

The most likely Article III judicial nominations that would be suitable for such an approach are nominations to U.S. district court judgeships.<sup>55</sup> The Senate might afford privileged status using any number of criteria, including whether the nomination was recommended by a bipartisan commission in the nominee’s home state; whether the nomination has the support of at least one home state Senator of the opposite party as the President; or whether the nomination is for a vacancy qualifying as a “judicial emergency” by the Judicial Conference of the United States. The Senate might also decide to allow a fixed percentage of U.S. district court nominations to go through the confirmation process as privileged nominations. The Senate, for example, might allow 25% of all district court nominations during any given year to be submitted as privileged nominations;<sup>56</sup> such an approach might, across different presidencies, provide for uniformity, predictability, and relatively speedy Senate approval of certain nominations that are uncontroversial and are supported by all Senators.<sup>57</sup>

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<sup>54</sup> The process might be expedited for such nominations because the committee would no longer need to hold a hearing on the nomination (as is the current practice for every circuit and district court nomination), and it would not need to schedule executive business meetings for the purpose of reporting privileged nominations to the full Senate.

<sup>55</sup> Providing a privileged status for at least some district court nominations would reflect long-standing Senate tradition on deferring to a district court nominee’s home-state Senators in determining whether a nominee is approved by the full Senate. Senator Sheldon Whitehouse, for example, has stated that “there is a tradition in this body that while circuit court nominees are considered what one might call, for better or worse, political fair game, there has been a tradition of courtesy and comity regarding district court judges who sit in the Senator’s home state when both of the home state Senators have agreed to and accepted the President’s recommendations and supported it, given their blue slip to the committee and so forth.” “Unanimous Consent Request—Executive Calendar,” Remarks in the Senate, *Congressional Record*, daily edition, Aug. 5, 2010, p.S6971. Additionally, many district court nominations receive little or no opposition, as measured by the number of “nay” votes received, when they are approved by the Senate. During the 112<sup>th</sup> Congress, for example, 63 of 99 district court nominations (or 64%) were approved by voice vote or a unanimous roll call vote. Such a proposal might help expedite Senate processing of nominations such as these, which had little or no opposition. For further discussion and analysis of Senate approval of uncontroversial judicial nominees, see CRS Report R42732, *Length of Time from Nomination to Confirmation for “Uncontroversial” U.S. Circuit and District Court Nominees: Detailed Analysis*, by Barry J. McMillion.

<sup>56</sup> Which specific nominations would qualify as privileged nominations might be determined as a result of negotiations among the chair of the Judiciary Committee, the Majority Leader, and the Minority Leader.

<sup>57</sup> As with S.Res. 116, such a process for judicial nominations would not apply to the nomination if any Senator objects to it. In those cases, the nomination would revert back to the regular confirmation process (i.e., by being referred to the Senate Judiciary Committee).

Treating some judicial nominations as privileged nominations, however, might raise concerns for at least some Senators. First, some Members might be concerned about preserving the role of the Judiciary Committee in having its say on every judicial nomination submitted by the President, including those considered routine or uncontroversial. Second, Senators might not want to signal potential problems with a judicial nomination by requesting that it be taken off the list of privileged nominations on the *Calendar* and instead be sent to committee. Third, a Senator desiring to lengthen the regular confirmation process for a nominee could do so by waiting to object to the new process until the nomination had been listed for nine days of session on the *Calendar* as a privileged nomination (and for which all information had been received). The objection would re-start the confirmation process to its initial stages, referral to committee, well after the Senate had received the nomination, instead of immediately upon receipt of the nomination. Nonetheless, such concerns might be addressed in any agreement to expedite the confirmation process for nominations qualifying as privileged nominations (including requiring more than one Senator to object to a nomination being listed on the *Calendar* as a privileged nomination).

## Treat District Court Nominations Differently than Circuit Court Nominations

Another option the Senate might consider is to treat, during various stages of the confirmation process, district court nominations differently than circuit court nominations. One proposal rests on the premise that the “best mechanism to relieve the mounting pressure on the district courts is to decouple the district judge nomination process from the deeply politicized circuit court nomination process”<sup>58</sup> and that “the whole problem with district judges is that the process has been bound up with practices for circuit judges.”<sup>59</sup>

Along these lines, the proposal includes three specific changes that might shorten the time from nomination to confirmation for district court nominees.<sup>60</sup> First, the Senate could, for district court nominees, streamline the Judiciary Committee questionnaire so that it is mostly limited to questions related to the nominee’s legal experience. The rationale underlying this proposed change is that, arguably, the only consequential questions for a district court nominee are those describing cases that the nominee decided as a judge or handled as a lawyer.<sup>61</sup> Additionally, such questions would still require nominees to provide contact information for judges and counsel involved with the cases on which they have worked.<sup>62</sup>

Second, the Senate could eliminate routine committee hearings on district court nominations. The rationale behind this change is that “the hearing generally has served to bog down progress

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<sup>58</sup> Shenkman, “Decoupling District from Circuit Judge Nominations,” p. 224.

<sup>59</sup> *Ibid.*, p. 298.

<sup>60</sup> Given the scope of this report, one change suggested for the pre-nomination stage of the confirmation process is not discussed. Specifically, an “Administration could modestly mitigate the powerful force of delay in the bargaining dynamic with Senators over district judge vacancies by publishing the status of pre-nomination negotiations, although not the names of the nominees themselves.” In short, the Administration would have a “nomination status page” that would indicate whether the White House had received nominee recommendations from Senators. Shenkman, “Decoupling District from Circuit Judge Nominations,” pp. 299-300.

<sup>61</sup> *Ibid.*, p. 303.

<sup>62</sup> The Miller Center Commission report also recommended reforming or shortening the questionnaire (including for circuit court nominees) stating that “the Senate Judiciary Committee should explore whether or not it is really necessary or appropriate to obtain all the information presently sought.” Miller Center Report, p. 9.

through the Committee of unobjectionable district judge nominations. And, even when both sides have good will in moving nominations forward, the hearing is the variable that injects most uncertainty into the confirmation schedule.”<sup>63</sup> Instead, “[w]ithout a hearing, a committee rule could be set with a minimum referral time to the Committee of sixty or ninety days, to be followed by a vote at the next business meeting (or whenever the blue slips have been returned, whichever is later) absent exceptional circumstances in which the majority and minority agree that a special hearing or investigation is required.”<sup>64</sup>

As the proposal emphasizes, this would be very similar to the process by which nominees to U.S. attorney positions are considered by the Judiciary Committee. Like district court judges, U.S. attorneys, it has been argued, “are key officers in the day-to-day operations of the federal legal system. Yet they receive no hearing, ordinary issues are handled promptly, and nominees are reported speedily.”<sup>65</sup> The primary defense of retaining the hearing, it is suggested, “is the opportunity of a conscientious Senator to impress upon nominees the importance of genuine issues of law.”<sup>66</sup> However, the proposal considers the “odds that the hearing becomes just another tool of delay are overwhelming,”<sup>67</sup> outweighing the need for Senators to emphasize particular concerns or issues to district court nominees.<sup>68</sup>

Finally, the proposal emphasizes expediting floor consideration of district court nominations. To this end, it would amend Senate rules to ensure a vote on such nominations shortly after being reported by the Judiciary Committee. One possible way to expedite the process is for the majority leader to be given the privilege “after a district judge nomination has laid over on the floor for one week, to call for an ‘expedited’ confirmation vote under a procedure requiring some higher threshold—perhaps the greater of sixty Senators or three-quarters of those present and voting. Nominations meeting the threshold would be confirmed; others would be returned to the Senate *Executive Calendar* for consideration under current rules, by unanimous consent or invocation of cloture.”<sup>69</sup> Such a procedure might be useful in reducing the leverage individual Senators have when they withhold their consent to proceed to a district court nomination (particularly those considered uncontroversial), an issue that some Senators have considered especially problematic in recent years.<sup>70</sup>

One possible concern with the above proposals for treating district court nominations differently than circuit court nominations is that they are modest in nature (and, thus, may not succeed in significantly reducing the amount of time from nomination to confirmation for many, if not most, district court nominees). Additionally, Senators might consider routine hearings for district court nominees to be of value and, thus, might be reluctant to eliminate them altogether.<sup>71</sup>

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<sup>63</sup> Shenkman, “Decoupling District from Circuit Judge Nominations,” p. 305.

<sup>64</sup> *Ibid.*, p. 306.

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*, p. 307.

<sup>67</sup> *Ibid.*, pp. 307-08.

<sup>68</sup> Any new procedure that eliminated hearings for district court nominees could, of course, include a provision that requires the Judiciary Committee to conduct a hearing for a district court nominee if requested by any Senator.

<sup>69</sup> *Ibid.*, p. 309.

<sup>70</sup> Senator Leahy, for example, has stated that during the 111<sup>th</sup> Congress, the Senate had “wasted weeks and months having to seek time agreements in order to consider nominations that were reported by the Senate Judiciary Committee unanimously and who are then confirmed overwhelmingly by the Senate once they are finally allowed to be considered.” “Executive Session,” Remarks in the Senate, Congressional Record, daily edition, March 2, 2010, p. S .906.

<sup>71</sup> One scholar notes that, for hearings conducted on lower federal court nominations, “the quality and depth of oral

## Conclusion

The Senate, if it determines that the lengthening judicial confirmation process is a problem, might consider various policy options to shorten the process. The Senate, for example, could create time frames for one or more stages of the confirmation process by establishing deadlines for acting on a nomination. Such time frames might have the effect of shortening the confirmation process for judicial nominees as well as standardizing (as much as possible) the process across presidencies. Some potential drawbacks of using time frames include the issue of enforcement (i.e., what happens if a time frame is not followed?) as well as giving the President greater leverage or influence in the selection of judicial nominees.

The Senate might also fast-track certain nominations. Some nominations, for example, might be classified as “privileged” nominations and, thus, be acted upon by the Senate in a relatively expedited manner. Such privileged nominations might include U.S. district court nominations for vacancies considered judicial emergencies and/or nominations considered uncontroversial. There might, however, be some drawbacks to fast-tracking some nominations, including the concern of some Members in preserving the role of the Judiciary Committee in having its say on every judicial nomination submitted by the President.

Finally, the Senate might treat district court nominations differently than circuit court nominations by streamlining the Judiciary Committee questionnaire for district court nominees, eliminating routine committee hearings for district court nominees, and expediting floor consideration of district court nominees by adopting an amendment to Senate rules that would ensure a vote on such nominations shortly after being reported by the Judiciary Committee. While treating district court nominations differently than circuit court nominations might make sense given differences in the nature of the work done by trial judges versus appellate judges, Senators might, for various reasons, be reluctant to change the process for district court nominees (e.g., Senators might consider routine hearings for district court nominees as valuable in assessing nominees’ professional competence or temperament).

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questioning varies widely.” He also discusses, however, reasons why Senators might nonetheless be reluctant to eliminate hearings for circuit and district court nominees, including using hearings to assess a nominee’s professional competence, personal integrity, temperament, political philosophies, and judicial management skills. In terms of the last factor, judicial management skills, he argues that “[s]ome of the most substantive exchanges between Senators and nominees have concerned issues of judicial management” rather than issues related to constitutional adjudication or judicial philosophy. See William G. Ross, “The Questioning Of Lower Federal Court Nominees During The Senate Confirmation Process,” *William & Mary Bill of Rights Journal*, vol. 10 (2001-02), pp. 124-160, 171.

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